
U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON. D.C.

DATE: May 10, 1990
CASE NO. 87-ERA-21

IN THE MATTER OF

BARBARA POGUE,
COMPLAINANT,

v.

U.S. DEPARTMENT OF THE NAVY
MARE ISLAND NAVAL SHIPYARD
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

The complaint in this case alleges a violation of the employee protection provisions of Federal environmental statutes, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9610 (1982).[1]

Complainant Barbara Pogue, an employee of the United States Department of the Navy (Navy) at its Mare Island Naval Shipyard, alleges that the Navy took certain retaliatory personnel actions against her in asserted violation of the environmental whistleblower statutes because she purportedly identified and reported on instances of improper handling, storage and disposal of hazardous wastes. The Navy defends on several grounds, raising issues relating to jurisdiction, coverage and the merits of Complainant's allegations. The Navy also raises issues concerning damages and attorney fees.

After a hearing on the complaint, Administrative law Judge (ALJ) Ellin M. O'Shea issued, on January 15, 1988, a recommended Decision and Order (D. and O.) finding that Federal employees are covered by the environmental whistleblower statutes alleged, and that the Navy had retaliated against Complainant in violation of

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those statutes. She ordered remedial action. On February 23, 1988, the ALJ issued a Supplemental Recommended Decision recommending that compensatory damages be denied and that any determination as to exemplary damages be postponed until after final determination of the jurisdiction issue. Thereafter, on march 24, 1988, the ALJ issued a recommended Decision and order Awarding Attorney Fees.

Upon review of the entire record in this case, including the very extensive briefs submitted to me by each of the parties, I have concluded that the ALJ was correct in finding that I have jurisdiction under CERCLA to entertain the complaint of Complainant pogue. Nevertheless, I find that Complainant Pogue has failed to establish that she was the victim of unlawful retaliation under any of the whistleblower statutes. In view of these findings, I make no rulings as to jurisdiction under the Solid Waste Disposal Act, the Clean Water Act or the Toxic Substances Control Act.

This case squarely presents the issue of whether Complainant Pogue, who alleges retaliation by her supervisors for making environmental complaints, may seek relief under CERCLA's whistleblower provision, or whether she is limited to relief under the whistleblower provision of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 2308(b)(8) (1982). Although claims of Federal employees have been entertained Under various environmental whistleblower statutes, the Secretary has not heretofore ruled directly on the issue of coverage of Federal employees. *See, Plumley v. Federal Bureau of Prisons*, Case No. 86-CAA-6, Sec. Order of Dismissal Approving Settlement July 20, 1987; *McAllen v. U.S. Environmental Protection Agency*, Case No. 86-WPC-1, Sec. Order Approving Settlement and Dismissing Case, May 5, 1987; *Kaufman v. EPA*, Case No. 83-CER-1, Sec. Approval of Settlement, July 14, 1983.

The Navy argues that I lack jurisdiction to entertain Pogue's complaint under CERCLA because Congress did not intend this statute to apply to Federal employees. In support of this position, the Navy argues: that there is no express language in CERCLA, nor any express statement in its legislative history, indicating coverage of Federal employees; that there has been no waiver of the sovereign immunity of the Federal government; and that CERCLA does not cover Federal employees because the CSRA established for Federal employees a comprehensive scheme to

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address all claims concerning adverse personnel actions.

I. Whether Complainant's Claims Are Covered by CERCLA.

The ALJ found that the plain meaning of CERCLA is that whistleblower claims of all employees, including employees of the Federal government, are covered by CERCLA. D.

and O. at 50-52, Thus, the ALJ rejected the Navy's contention that there is "no evidence that Congress either expressly or implicitly intended that federal employees be afforded the remedies contained therein." Respondent's Post Trial Reply Brief at 3.

Before me, the Navy makes a different argument as to the inapplicability of CERCLA to Federal employees -- that the Federal government is not a "person" prohibited by CERCLA from discriminating against whistleblowers, because the Federal government has not waived its sovereign immunity with respect to the CERCLA whistleblower provision.

Upon review of the briefs of both parties and consideration of the arguments therein, I reject both of the Navy's arguments.

I.a. Statutory language.

I start with the language of the statute. "Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." *Blum v. Stenson*, 465 U.S. 886, 896 1984). *Bradley v. Austin*, 841 F.2d 1288, 1293 (6th Cir. 1988).

The CERCLA whistleblower provision provides that no 'person" shall discriminate against "any employee." 42 U.S.C. § 9610 (a). Section 9610 is a part of Subchapter I of CERCLA. The definition of "person" for the purposes of Subchapter I is set forth in section 9601(21) of Subchapter I, and specifically includes the "United States Government."[2] Both section 9610 and section 9601 were enacted at the same time as part of the original statute, CERCLA of 1980. Clearly then, the United States Government is a "person" prohibited by section 9610 from discriminating against whistleblowing employees such as Complainant Pogue.

That the whistleblowing employees protected by CERCLA against retaliation by the Federal government do not include the government's own employees is nowhere stated or even suggested in either the statute or its legislative history. The protection

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of section 9610 is specifically afforded to "any" employee, 42 U.S.C. § 9610(a), and its remedies are specifically made available to "any" employee. 42 U.S.C. § 9610(b). The use of the adjective "any" without descriptive words of limitation requires that the phrase be given its common meaning of "all" or "each and everyone", and that it thus exclude no employee. Consequently, I find no ambiguity in the language of section 9610 which would support the exclusion of Federal government employees such as Complainant. *See United States v. Arizona*, 295 U.S. 174, 184 (1935), holding that, where general terms are used, they include Federal employees.

This is confirmed by the provision of CERCLA, generally referred to as the Federal facilities section, which requires Federal agencies to comply with the CERCLA requirements to the same extent as nongovernmental persons:

> Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity . . . .

42 U.S.C. § 9620(a). As noted above, the term "person" includes the United States Government, 42 U.S.c. § 9601(21), and the employee protection provision of the Act stipulates that no "person" shall in any way discriminate against "any employee" for engaging in protected activity, including participation in any proceeding under or resulting from "the administration or enforcement of the provisions" of CERCLA. 42 U.S.C. § 9610(a).

Moreover, Section 9659 of Title 42, 42 U.S.C. § 9659 (Supp. IV 1986), permits any person to file suit against the United States for violation of any standard, requirement, etc., which is in effect. Under this provision, an employee of the Federal government may file a citizen's suit against an agency for violation of environmental standards. As pointed out by complainant, if the CERCLA whistleblower provision were read to exclude Federal employees, "nonfederal employee whistleblowers participating in an action against a federal facility would be protected, while federal employees engaging in the same action would not. This aberrant result should not be lightly inferred, and is clearly unsupported by the statute, legislative history or any case law." Complainant's Response Brief on Review (Complainant's Response) at 20.

Moreover, narrowly reading "any employee" to exclude Federal employees would frustrate the statute's goals:

> CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment. We are therefore obligated to construe its provision liberally to avoid frustration of the beneficial legislative purposes. *Mottolo*, 605 F. Supp. at 902; *Conservation Chemical*, 619 F. Supp. at 192. With this in mind, we join the Second Circuit in proclaiming that "[w]e will not interpret section 9607(a) in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intent otherwise." *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985).

Dedham Water Company v. Cumberland Farms Dairy Inc., 805 F.2d 1074, 1081 (1st Cir. 1986). To limit CERCLA's whistleblower protection to nongovernmental employees would substantially diminish the sources through which information could be obtained as to compliance with the environmental requirements of the statute, thus undermining the

statute's objectives, Accordingly, I conclude that CERCLA applies to Complainant Pogue's claims.

I.b. Sovereign Immunity.

The Navy argues that CERCLA cannot be applied to Federal employees because Congress has not expressly waived the sovereign immunity of the Federal government with respect to that provision. Complainant, citing to Rule 12(b) of the Federal Rules of Civil Procedure,[3] argues that the Navy has waived the sovereign immunity defense because it was not raised before the ALJ.[4] Complainant's Response at 22. I reject Complainant's argument.

Sovereign immunity is a jurisdictional defense, and may be raised at any time.

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> *The absence of consent is a fundamental, jurisdictional defect that may be asserted at any time*, either by the parties or by the court on its own motion. Only Congress can waive the United States' sovereign immunity and *the government is not subject to assertions of waiver or estoppel when it raises the defense*.

14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3654 (Supp. 1989) (emphasis supplied). Professor Wright points out that Judgments obtained against a governmental entity immune from suit have been held to be void and not entitled to res judicata effect. *Id. See also United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1941). Accordingly, I shall consider the Navy's sovereign immunity argument.

It is not disputed that the United States may be sued only if Congress has consented to the action. *See Library of Congress v. Shaw*, 478 U.S. 310 (1985). Contrary to the Navy's position, Respondent's Initial Brief in Response to Administrative Law Judge's Decision and order (Navy's Initial Brief) at 9 and 11, this consent need not be express, but must be clear and unequivocal. "[A) waiver of sovereign immunity is accomplished not by a "ritualistic formula'; rather intent to waive immunity and the scope of such waiver can only be ascertained by reference to underlying congressional policy." *Franchise Tax Board of California v. U.S. Postal Service*, 467 U.S. 512, 521 (1984), (citing *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 389 (1939)).

The Navy recognizes that, through enactment of CERCLA'S Federal facilities and citizens' suit provisions, the Federal government has waived its sovereign immunity. The Navy, however, contends that these "general statutory waivers," as it terms them, pertain solely to "substantive compliance with objective criteria" and do not expressly incorporate either the protective requirements of the whistleblower Provision of CERCLA nor the damages awardable thereunder. In the Navy's view, the definition of "person," which specifically includes the United States Government, cannot control on this point because section 9620 of CERCLA, which contains provisions relating to

Federal facilities, was not enacted until October 17, 1986. Thus, argues the Navy, sovereign immunity "has only been waived for protected activity occurring subsequent to that date." Navy's Initial Brief at 13.[5]

As explained below, I do not adopt the Navy's arguments;

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rather, I find that the sovereign immunity of the Federal government has been waived in CERCLA as to the claims involved herein. The express inclusion of the Federal government in the definition of "person", 42 U.S.C. § 9601(21), accompanied by the requirement that Federal facilities comply with CERCLA provisions to the same extent as nongovernmental persons, are unequivocal expressions of Congress' intent that Federal agencies should comply with the CERCLA whistleblower provision in cases such as this. Originally enacted in section 9607(g) of CERCLA of 1980, the Federal facilities provision was subsequently (in 1986) included as section 9620(a). 42 U.S.C. § 9620(a) (Supp. IV 1986). This provision states that "each department, agency, and instrumentality" of the United States "shall be subject to, and comply with, *this chapter* in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity . . . ." (Emphasis supplied). The "chapter" referred to in this provision encompasses the entire CERCLA statute. No section of the statute is exempted. Congress emphasized this in the legislative history of the 1986 CERCLA amendments. *See* H. Rep, No. 253(I), 99th Cong., 2d Sess. 93, *reprinted in* 1986 U.S. Code Cong. & Admin. News 2875, stating that Federal agencies are required to comply with "*this legislation and the current law*" in the same manner and to the same extent as any nongovernmental agency. (Emphasis supplied). *See also id*. at 2946, pointing out that "[t]he section would apply all requirements, standards, guidelines, rules, regulations and procedures applicable under CERCLA to facilities owned or operated by the federal government and states that no federal agency or department may adopt provisions which are inconsistent with such rules and regulations." I conclude, therefore, that Congress has made clear its intent to require Federal agencies to comply with the whistleblower provision of CERCLA in cases such as this.

The Navy's argument that this waiver is limited to activities occurring after the 1986 enactment of section 9620 is not valid. The requirement that Federal entities comply with all Federal requirements was contained in section 9607(g) of the original act. Pub. L. No. 96-510 § 107(g), 94 Stat. 2783 (1980). Although section 9607(g) was expanded in 1986 and incorporated into the current section 9620, the language reflecting the waiver of sovereign immunity is virtually identical in both sections. Both sections provide that Federal agencies "shall be subject to, and comply with, this chapter in the same Manner and to the same extent, both procedurally and substantively, as any

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non-governmental entity . . . ." *Compare* 42 U.S.C. § 9607(g) with 42 U.S.C. § 9620(a).[6]

Finally, I find that Congress waived the sovereign immunity of the United States by enacting the CERCLA citizens' suit provision, which permits suits against any person, including the United States, if alleged to be in violation of the statute. Congress waives immunity when it authorizes a governmental entity to sue and be sued in its own name. *See Franchise Tax Board of California v. U.S. Postal Service*, 467 U.S. at 517-522 and n.15.[7]

II. Whether the Civil Service Reform Act of 1978 Provides An Exclusive Remedy.

The Navy argues that the civil Service Reform Act of 1978 (CSRA) precludes Complainant from seeking remedies under CERCLA, Respondent's Initial Brief at 50, because CSRA Section 2302 (b) (8), which applies solely to Federal employees, includes as prohibited personnel practices the taking of personnel actions in reprisal for whistleblowing.[8] While recognizing that CERCLA was enacted more than two years after the CSRA, the Navy argues that, "if Congress had intended the CERCLA provision to create a new right of appeal for federal employees so soon after enacting the CSRA, there would have been some comment or discussion, particularly in light of the widespread public debate which occurred in the process of enacting the CSRA." Navy's Initial Brief at 19. The Navy's position, therefore, is that the CSRA is the exclusive remedy for all Federal environmental whistleblowers.

As already noted, Congress made clear through the CERCLA definition of "person", and by the CERCLA Federal facilities provision, that the CERCLA whistleblower provision applies to claims such as these.

Moreover, subsequent to passage of CERCLA, Congress has made clear that CSRA is not the exclusive remedy for Federal whistleblowers. In enacting the Whistleblower Protection Act of 1989 (WPA), which amended § 2302 (b) (8) of the CSRA to strengthen the protection afforded whistleblowers, Congress stated in the Joint Explanatory Statement[9] for the WPA:

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15. AVAILABILITY OF OTHER REMEDIES

The bill contains a new section 1222 of title 5, United States Code, which *provides that the network of rights and remedies created under* chapter 12 and chapter 23 of title 5 *is not meant to limit any right or remedy which might be available under any other statute. Other statutes which might provide relief for whistleblowers include* the Privacy Act, *a large number of environmental and labor statutes which provide specific protection to employees who cooperate with federal agencies*, and civil rights statutes under title 42, United States, Code. Section 1222 is not intended to create a cause of action where none otherwise exists or to reverse any court decision. Rather, section 1222 says *it is not the*

> *intent of Congress that the procedures under chapters 12 and 23* of title 5, United states Code *are meant to provide exclusive remedies*.

135 Cong. Rec. § 2782 (daily ed. March 16, 1989); 135 Cong. Rec. H750 (daily ed. March 21, 1989) (emphasis supplied).

Although the provision of the CSRA of concern here is section 2302(b) (8) prior to its amendment by the WPA,[10] the Congressional statement as to the exclusivity of the WPA is entitled to consideration in discerning the intent of the enacting Congress as to the exclusivity of section 2308 of the CSRA. "Of course, the view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have Persuasive value." *Bell v. New Jersey*, 461 U.S. 771, 784-5 (1983). *Accord Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) The legislative statement in the WPA makes it clear that Congress does not intend that a Federal whistleblower, such as Ms. Pogue, should be barred from remedies available under CERCLA.

In summary, I conclude that Congress intended that CERCLA whistleblower protections should extend to claims such as those asserted by Complainant. Accordingly, I find that CSRA is not Complainant's exclusive remedy, and that I have Jurisdiction under CERCLA to adjudicate the complaint of Complainant Pogue, I turn now to the facts of this case.

III. Findings of Fact.

Complainant was hired at Mare Island Naval Shipyard (Mare Island) in mid-1982. Transcript of hearing (T.) at 134. Prior to that she had worked at the Norfolk Naval shipyard since 1980

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as an Assistant Ship Test Engineer. *Id*. Complainant's first assignment at Mare Island was in the Nuclear Quality Engineering Division of the Nuclear Engineering Department. Complainant has a degree in nuclear engineering. D. and O. at 7; Complainant's Exhibit (C)-7.

Complainant's performance was evaluated for the first time at Mare Island on April 25, 1983. C-8. At that time, Complainant was in grade GS-9. Her performance was rated satisfactory overall, but on two out of four performance elements, the appraisal noted in the rating column "[n]ot observed." *Id*.

Complainant transferred to the Nuclear Engineering Department sometime after April 25, 1983, where her performance was evaluated by Mr. Zebrowski on March 28, 1984. At that time, complainant was a GS-11. C-14. The performance evaluation rated Complainant satisfactory overall, but on performance element number one [w]ork instruction nuclear (WIN) Preparation and on- schedule," Mr. Zebrowski noted under

"[c]omments," "[a]reas of expected improvement have been discussed with engineer." This was one of two "[c]ritical elements" out of a total of five performance elements.[11]

On March 29, 1985, Complainant's performance was evaluated again by Mr. Zebrowski. C-25. Complainant was then a GS-12. Mr. Zebrowski rated Complainant satisfactory overall, but noted under "[C]omments" for critical element number one "marg[inal] sat[isfactory]." On the non-critical element number 3, "[p]reparation of off-yard correspondences (sic), documents," Mr. Zebrowski noted (apparently during a mid-year review) "[t]imelyness [sic] of off-yard correspondence is Marginal . . . ."[12] Mr. Zebrowski noted on the next page on March 29, 1985, that "[t]here has been a significant improvement in . . . timelyness [sic] of off-yard correspondence."

For non-critical element number five, "[p]erform code representation functions," Mr. Zebrowski commented "[s]ince engineer has been assigned to attend SGN 687 POD has attended less than 50% of the POD's held. Needs to improve attendance and participation at assigned POD's."[13] Mr. Zebrowski also noted "[o]n 9-13-84 discussed with employee for second time the need to get doctors [sic] signed excuse for all sick leave due to apparent abuse of sick leave and must talk to her supv. [illegible] call in." Mr. Zebrowski's notes on the performance

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evaluation form continue:

> Note: Employee refused to sign performance appraisal[.] Employee requested in writing ways to improve performance, so attached of 10-10-84. Also discussed with employee on 10-9-84 possibility of her talking with counciler [sic] at civ. employee ass. prog.

Four days before receiving this performance evaluation, on March 25, 1985, Complainant submitted to the head of the Nuclear Engineering Department a Request for Change to Lower Grade, in which she requested that she be downgraded from GS-12, step 1 to GS-11, step 5 "contingent upon transfer to code 380." C-24.[14] The reason Complainant gave for this request was "[t]he working level in 380 is an 11, the working level in NED [Nuclear Engineering Department] is a 12[.] Therefore to transfer to 380 I must take an 11." *Id.* The transfer and change in grade were approved and Complainant's position title changed from Nuclear Engineer, which was the area of her education and experience, to Mechanical Engineer. *See* C-14; Respondent's Exhibit (R)-63.

Complainant's new supervisor in the Special Facilities Branch of the Production Engineering Division was Mr. Stephens. on March 31, 1986, Mr. Stephens gave Complainant her first performance evaluation under his supervision, covering the period October 22, 1985, to March 31, 1986. R-63, pp. 559-600. He rated her performance overall marginal. On performance element number one, a critical element described as "[c]ompletes long term assignments . . . which are technically complete, accurate and

workable," Mr. Stephens rated Complainant "Marginal" because "[a]t least 35% of work (documents) are not workable when given to supv. or shop for review[.]" Complainant also was rated "Marginal" on critical element number 3, "[c]omplete Facility Engineering Documents within agreed upon scheduled dates." Mr. Stephens commented in regard to this element: "[r]escheduling required 30% of time." Complainant was also rated "Marginal" on non-critical element number 4, [c]ommunicates & cooperates with [personnel in other offices] for obtaining information or effectively resolving problems" because of complaints about her from another office. When complainant signed the appraisal she added "[n]ote: I disagree totally with this appraisal [illegible]."

On the same day, March 31, 1986, Mr. Stephens gave Complainant a note on a Yard Route Slip establishing detailed

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controls over each phase of her work. R-63, p. 601. The note stated:

> Because your performance is "marginal" you will be given a progress review in 30 days and re-appraisal in 60 days. If your performance is satisfactory, the marginal rating will be amended.
> To help you raise your performance level the following step will be started.
> 1. Require you to give me an outline of each new document (not minor rev's) so we can dissus (sic).
> 2. We will spend one hour per week going over various tech. subjects.
> 3. For each project I will give you the following dates a) start work b) outline to me and dissus (sic) c) out for 1st review d) final due.

Complainant filed a grievance over this appraisal. At the first step of the grievance procedure, reconsideration by Mr. Stephens, he agreed to change the "Marginal" rating on element number 4 because the information on the criticism of Complainant by another office was inaccurate. R-63, p. 602. At the 30 day review of Complainant's performance, Mr. Stephens found Complainant was "doing better" on element number 3, meeting scheduled dates, but on critical element number one, submitting workable documents, he said "[t]his area still needs work". R-63, p. 603. After 60 days, on June 9, 1986, Mr. Stephens agreed to change the rating on element number three to "Satisfactory". He still found Complainant's performance on critical element number one in need of improvement, and because this element was "Marginal", he would not change the overall rating of "Marginal". R-63, p. 604.

Complainant disagreed with Mr. Stephens' decision not to change the overall "Marginal" rating. In a memorandum of June 17, 1986, complainant complained; among other things, that Mr. Stephens did not give her the promised training and did not give her the promised dates for completion of her assignments. She pointed out that if he did not change his rating, she would not get her step increase on time.

Complainant's grievance over Mr. Stephens' evaluation of her

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performance went to the second step of the grievance procedure before the Production Engineering Division Manager, Mr. Priess. The grievance was denied on August 1, 1986. R-63, pp. 612-613. Mr. Priess found that:

> [m]y review of the evidence indicates that your supervisor has fulfilled his obligation to provide training and help with job scheduling. He has changed your rating in two of the performance elements based on your improvement in these areas. Critical element #1, however, still requires improvement . . . . [W]hen any critical element is Marginal, the overall rating will be Marginal. There is no indication that Mr. Stephens has asked you to perform any work which is beyond your capabilities and has, in fact, spent extra time reviewing what is expected of your performance, helping you to bring the performance rating up to Satisfactory level in two of the established elements on your performance appraisal.

Complainant's within-grade increase, due on August 17, 1986, was withheld. In his memorandum notifying Complainant of this decision, Mr. Stephens said "[i]n order to receive a within-grade increase, you must improve your work." In addition, he warned complainant that "[y]ou are further advised that if, at any time, your performance falls below the marginal standard, action to remove you from your position will be taken . . . ." R-63, p. 615.

During this time period, Complainant also filed a grievance claiming that Mr. Stephens was harassing her by counseling her on possible sick leave abuse and having a union representative and a person from the employee assistance program counsel her; by disapproving a leave slip; and by placing Complainant on "Z leave" for consulting with the union on work time without his approval. R-63, p. 616.

After meeting with Complainant and her union representative, Mr. Stephens sent them a memo rejecting her charges. R-63, p. 616. The memo stated that Complainant had "a pattern of taking sick leave as it becomes available. She has not had over 25.5 hours since she (transferred to Mr. Stephens' office). . . . Barbara is the only person in my section to have a problem with sick leave." Mr. Stephens explained further that he disapproved the leave slip because Complainant gave it to him 25 minutes before the leave was to begin with no explanation for this "last

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minute-request." Mr. Stephens said Complainant was spending more than the allowed time for grievances, and reduced her compensatory time accordingly. Mr. Stephens concluded by saying "I have not been harassing Barbara Pogue. My concern is that her

work assignments are taking too long to complete and she is not spending as much time on her assigned work as she should." Id. Mr. Stephens' memo is dated August 21, 1986.

On September 10, 1986, Complainant transferred into the Occupational Safety and Health office, Occupational Health Technical Division (OHTD) under Michael Noble's supervision.

Complainant introduced a number of documents tending to show that people she came in contact with prior to and after transferring to OHTD viewed her work favorably. *See*, e.g., C-1, 9, 11, 17, 19, 37, 62, 129.[15] None of these documents, however, is an official performance appraisal and there is nothing in the record to show that Mr. Noble was aware of them when he hired Complainant or later.

Mr. Noble was well aware, however, of the problems Complainant had in her prior two positions under Mr. Stephens and Mr. Zebrowski. Mr. Noble spoke with Mr. Stephens' supervisor, Mr. Kelly, in the summer of 1986 about her performance.[16] Mr. Kelly told Mr. Noble that he had problems with Complainant's quality of work, her ability to get along with staff members, and her constantly going around Mr. Stephens to Mr. Kelly. T. 839- 40. Mr. Nobel also spoke to Mr. Christianson in the Nuclear Engineering Department who told him Complainant had similar problems while working there. T. 843. Mr. Christianson also said that "with a lot of additional coaching [Complainant] could work out," *Id*.[17]

In February and March 1986, Mr. Noble began recruiting efforts to hire a new environmental engineer because the incumbent, Dr. Cornils, was about to be promoted into a position in another office. T. 834-35. Mr. Noble and his supervisor, Mr. Carroll Tatum, had discussions in July 1986, with Mr. Kam Tung, an engineer in the private sector, and decided to hire him. T. 835-36.

Complainant spoke to Mr. Noble about transferring into his office a few weeks after he decided to hire Mr. Tung as environmental engineer. T. 837. Complainant was interested in the hazardous waste oversight position, but Mr. Noble told her Dr. Cornils had told him the personnel office had not found her qualified for that position, and in any event, he had already

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made a commitment to Mr. Tung. *Id*. Complainant came to see Mr. Noble several times and he told her the only Position he had was in industrial hygiene engineering. T. 838. Mr. Noble told Complainant he was aware of the problems she was having in the Production Engineering Division. T. 842. He decided to hire her as a mechanical Engineer because she expressed a strong interest in hazardous waste which Mr. Noble thought would be transferable to hazardous material industrial hygiene. T. 844.

Mr. Noble assigned Complainant to work temporarily on hazardous waste oversight until Mr. Tung came on board. Mr. Noble had been directed by the Shipyard Commander on September 3, 1986, "to take immediate action to establish an interim capability" for hazardous waste oversight until the hazardous waste engineer was "on-board and up to speed." R-23; T. 846-47. Complainant understood that she was being assigned to hazardous waste oversight on an interim basis, C-218, and not as the permanent position title into which she was transferring. T. 438. Mr. Noble's supervisor, Mr. Tatum, the Director of the Occupational Safety and Health Office, testified that, at the time Complainant transferred to OHTD, the Shipyard Commander had decided there was an immediate need to make the hazardous waste program visible again. T. 1368. Two other people, in addition to complainant, who had no experience in hazardous waste, were assigned to auditing of waste problems. T. 1369. The objective was to make very simple findings, not in-depth auditing. T. 1369-70. Mr. Tatum also did not intend to assign Complainant to hazardous waste auditing permanently. T. 1371. *See also* testimony of Mr. Tung at 1208.

The first hazardous waste audit at Mare Island had been ordered by Mr. Tatum in 1983. T. 1353. He had directed the OHTD to conduct the audit because of the lack of any auditing of hazardous waste. T. 1354. The audit was not required by any statute, regulation, or Mare Island directive. T. 1353-54. That first audit report, issued on January 24, 1984, R.1, was signed by Mr. Noble, who had been a Compliance Officer with the occupational Safety and Health Administration of the Department of Labor for three years. T. 791. The line managers were shocked by the report and the fact that hazardous waste problems existed. T. 1354. The report found 43 areas of noncompliance with specific regulations or Navy directives and 27 areas of partial compliance. After the California state Department of Health Services conducted an investigation in 1984 and made several findings of violations, the Shipyard Commander ordered establishment of a regular audit program. R-20; T. 1355.

Complainant worked on hazardous waste audits from her starting date in OHTD, September 10, 1986, T. 847, until October 28, 1986. T. 931. Mr. Noble gave Complainant guidance on sites around Mare Island to audit. He directed her to use prior audits and the state investigation report to follow up to see if they were still out of compliance. Mr. Noble directed Complainant to advise him of serious violations immediately. T. 854; R-27.

Although Complainant's first hazardous waste audit report was "very rough," T. 862, Mr. Noble accepted it in that form because he understood that Complainant was new to the area and was under pressure to produce a report quickly. Id. Mr. Noble wrote to complainant on a copy of her first report saying "Barbra [sic] - Looks good. See comments. Lets really hit this week I want to get as many places looked at as possible . . . ."

Mr. Noble had many problems with Complainant's subsequent reports, however. He expected her, as a GS-11 "full performance journeyman engineer," T. 862, to be at or close to the full performance working level for a professional engineer, including preparing reports, doing research, evaluating process problems and making recommendations to management. T. 863. Mr. Noble accepted Complainant's citation of numerous statutory and regulatory requirements for each violation found where one would have been sufficient, because she was new to the area. T. 863- 864. But, Mr. Noble found Complainant's reports wordy, ungrammatical, poorly organized, and containing too much of Complainant's opinions rather than simply reporting facts. T. 864. Mr. Noble edited Complainant's reports to make them more effective, with more impact on those to whom they were addressed, but did not delete any of the violations found. T. 872. *Compare*, e g., C-100, pp. 492-494, Complainant's draft of Hazardous Waste Oversight Program surveillance Report #20, including Mr. Noble's editing marks, *with* R-30, PP. 200-202, the same report after it had been rewritten.

At the end of October 1986, Mr. Noble directed Mr. Tung to review and edit Complainant's last reports, T. 892; R-29, p. 109, and assigned Complainant to the work he originally hired her to do, industrial hygiene engineering. T. 884.

In late September 1986, Mr. Balli, a supervisor in the production engineering department, called Mr. Noble to complain about the conduct of a hazardous waste inspection team. T. 894. Mr. Noble set up a meeting with Complainant and Mr. Balli to discuss his concerns. T. 895; C-5. Mr. Noble cautioned Complainant that Mr. Balli might get emotional because he was

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upset that someone on the audit team had said they were out to "get somebody," T. 894, and because Mr. Balli felt he was being held responsible for hazardous waste dumping over which he had no control. T. 895. Mr. Noble told Complainant the meeting was not to question her credibility, but to try to resolve Mr. Balli's concerns. T. 897. Mr. Noble wanted to maintain a good working relationship with Mr. Balli so that the hazardous waste problems could be resolved. T. 899-900. After an emotional beginning, the meeting concluded with Mr. Balli making some commitments to resolve some of the problems. T. 900-901.

However, after the meeting, Complainant accused Mr. Noble of playing politics with Mr. Balli. She thought that setting up this meeting, which she considered a "critique" of the report, was "unreasonable." T. 195. She accused Mr. Noble of watering down her report. T. 901.

Another member of the audit team, Mr. Hanson, who also participated in the meeting with Mr. Balli, told Mr. Noble he thought Complainant had acted in an unprofessional manner in the meeting. T. 902. A few days later, Mr. Noble called Complainant into his office and talked with her about what he viewed as her communications problem and

suggested she take some training in this area. T. 903. Complainant said this suggestion was unfair. Id. Mr. Noble made no changes in Complainant's hazardous waste report as a result of the meeting with Mr. Balli. T. 906.

On or about october 15, 1986, Complainant attended a meeting on Used Solvent Elimination (USE), although she had no responsibility for that program. T. 927. Dr. Cornils told Mr. Noble that Complainant's behavior in the meeting was very counterproductive. She was argumentative, causing employees in Dr. Cornils' office to be reluctant to deal with her after that. T. 928. In January 1987, Dr. Cornils declined to select Complainant for an environmental engineer position in his office. He told her that "her uncontrolled actions at a past meeting concerning USE was the deciding factor." R-56, p. 542. A few days after the USE meeting, Mr. Noble spoke to complainant about her conduct at the USE Meeting, He told her that he thought she was creating an appearance of a conflict of interest by trying to advance her ideas on solvent recovery in this meeting when she stood to gain financially because she had submitted a formal suggestion on it. T. 929; R-73, p. 880.

Mr. Noble gave Complainant a new assignment on October 28, 1986, to conduct a noise control engineering feasibility study. R-69, P. 696. Noise control is an aspect of industrial hygiene, which was the area of work for which Complainant had originally

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been hired by Mr. Noble. T. 935. Mr. Noble gave Complainant reference materials on noise control, *id.*, and a self-study text on industrial hygiene in which she was to concentrate on noise control. T. 963-64. Mr. Noble directed Complainant to work with Mr. Loyberg, an audiologist, to learn how to use a sound level meter, how to establish interim controls for hearing protection, and to assist her in making her initial assessments of noise problems in the production shops. T. 962.

The noise control assignment had three steps. First, using an industrial hygiene survey conducted by the Mare Island Naval Hospital, Complainant was to make a list of noise hazardous areas. T. 959. Next, Complainant was to "prioritize" the list by "exposure risk and sound level, [and] number of personnel exposed," and develop target dates for studying each location. T. 961; R-69, P. 696. Finally, Complainant was to conduct engineering feasibility studies of the identified problem areas on how noise in the machinery or equipment could be reduced. R-69, P. 696.

Mr. Loyberg, the audiologist who worked with Complainant on the noise control assignment, described Complainant's assignment as "go[ing] over . . . noise measurements that had been previously made, . . . pick[ing] out those areas that presented the most hazard to the greatest number of people, and . . . work[ing] on providing . . . engineering noise controls . . . ." T. 1864. Mr. Loyberg described these engineering controls as "low echelon," like tightening loose parts or adding padding where metal hits metal. T. 1864-65.

Complainant told Mr. Noble she thought the noise control assignment was trivial, T. 966, and told Mr. Loyberg it was unimportant and a waste of time. T. 1871. Mr. Noble explained to complainant that noise control was very important because Mare Island had a potential liability of $500,000 a year for workers' compensation claims for hearing loss. T. 967. *See also* T. 1365, 1862.

Complainant's progress, or lack of progress from Mr. Noble's point of view, on this noise control assignment was one of the major factors in Mr. Noble's decision to give Complainant a Notice of Unsatisfactory Performance, and 30 Day Period to Correct Performance on January 22, 1987, and a Notice of Unsatisfactory Performance, Decision to Transfer, and Withhold Within-Grade Increase on April 10, 1987. *See infra* at 41-42, and 46.

On November 14, 1986, Complainant was removed from a meeting of Mare Island managers who were preparing for a meeting with the

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Shipyard Commander on hazardous waste. T. 221; 974. Mr. Noble testified COmplainant came into his office and screamed at him that he had her removed from the meeting because he did not want her working on hazardous waste and was playing shipyard politics. T. 974. Mr. Noble told Complainant her work on her assignments was unsatisfactory. Mr. Noble conceded he got angry because of the accusations Complainant was making and because in ten years as a supervisor he had never had an employee speak to him that way. T. 975; R-69, p. 694. Mr. Noble thought Complainant's behavior was similar to her conduct after the meeting with Mr. Balli. T. 979. Complainant told Mr. Noble that she and an employee in another office had concerns about hazardous waste problems that were not being addressed. Mr. Noble told her to prepare a report on these problems and send it through Mr. Tung, Mr. Noble and Mr. Tatum. T. 997-98.

A few days later, on November 17, 1986, Mr. Noble called Complainant into his office to tell her he would not tolerate the kind of behavior she exhibited on November 14. He warned her he would take disciplinary action if it happened again. T. 981; R-69, p. 695. Mr. Noble also spoke to Complainant about her noise control assignment and self-study project; Complainant again characterized the noise control project as trivial. Id.

Complainant testified that in mid-November 1986, she became concerned that the last two hazardous waste reports she had drafted were being held up and might not be issued at all. T. 214. Relying on assurances of confidentiality from the shipyard commander published in the Mare Island newspaper, Complainant wrote a letter to the Commander asserting that Mare Island was in violation of several hazardous waste requirements. She also alleged that her supervisor "doesn't want the hazardous waste reports to be too hard hitting because he might get somebody angry" and that she had been reassigned "because my reports were too contraversial [sic] and hard hitting." C-116. Most of the letter

explains Complainant's proposal for used solvent elimination.[18] Complainant requested that the Commander keep the letter confidential.

The Mare Island Commander told Mr. Tatum, Mr. Noble's supervisor, about Complainant's letter during a routine meeting on December 2, 1986. T. 1385. The Commander did not give Mr. Tatum a copy of the letter and did not tell him it was confidential. Mr. Tatum told Mr. Noble about the letter the same day. Mr. Tatum told Mr. Noble he did not know the contents of the letter but that it alleged a cover up. T. 1387-88,

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Mr. Noble was upset about the letter because he believed it was the report on Complainant's concerns about hazardous waste she had mentioned to him on November 14, and which he had directed her to send through Mr. Tung, himself and Mr. Tatum. T. 897; 1388.

On December 3, 1986, Mr. Noble Met with Complainant. He told her he knew about the letter to the shipyard Commander. He said he "considered her letter . . . a direct violation of my order to prepare a report signed by [Complainant] and [the other employee she referred to] and forward it to [Mr. Tatum] via Kam [Tung] and myself." C-121; T. 1002-1003. Complainant replied that these were two separate letters, Mr. Noble also told complainant that her work output on the noise control project was inadequate. All she had produced since October 28 was a list of noise hazardous areas, a task Mr. Noble thought a clerical employee could have done in 8-10 hours. C-121. He gave her specific requirements for how many assessments should be done each week because none had been done yet. C-121; R-65 p. 703; T. 1008. Mr. Noble directed Complainant to consult with Mr. Loyberg, the audiologist, for assistance in making the assessments. R-69, p. 703; T. 1008-1009.

After the meeting, Complainant made inquiries about a temporary transfer to another office. T. 225-226. Mr. Noble told Complainant he would not agree to a temporary transfer because she would still be counted against his personnel ceiling and his office was short-handed as it was. C-124; 1043-44; T 1393-94.

On December 8, 1986, Complainant asked Mr. Noble if she could pick up a Hewlett-Packard computer system from the surplus property office. Mr. Noble told her to check with Mr. Noel (the Automated Information Systems (AIS) Project Manager, T. 1031) to find out if the computer was compatible with the new AIS being installed. If it was, Mr. Noble told Complainant she could acquire the computer. R-73, p 871; T. 1029; 2044. If not, Mr. Noble directed her not to obtain it for the purpose of trading it for property or services from other offices. R-73, p. 871; T. 1029. Complainant asked Mr. Noel about it and he said he did not need the computer. T. 2045. Nevertheless, Complainant decided to pick up the computer anyway just "to get the computer [to store it and] possibly use it in trade." *Id*. Complainant asked four other employees to help her obtain the computer; she

asked Mr. Reynolds, another engineer, to sign for it at the surplus property office, and all four of the other employees helped her move it into a bomb shelter. T. 1029, 1034; R-73,

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p. 873. She gave them the impression Mr. Noble had approved acquisition of this computer. T. 1034; R-73, p. 872. Two of the employees complained to Mr. Noble right after moving the computer about spending their time in this way. T. 1029, 1032. One of them felt he had been "snookered" into this by Complainant. R-73, p. 872.

On December 16, 1986, Mr. Noble saw Complainant using a microfiche reader which she also had apparently obtained from the surplus property office. Complainant said this was her hobby and she would only play with it during lunch or on her own time Mr. Noble told her it was not appropriate to bring her hobbies into the office and that he did not want any more "junk" (non- functioning or excess government property) brought into the office. T. 1030.

Complainant also came into Mr. Noble's office on December 16, 1986, to ask if she could have the construction workers who were building a computer room for Mr. Noel build a loft in it. When Mr. Noble tried to cut off the discussion by telling her this was not in the budget, Complainant suggested picking up some insulation at the surplus property office to trade for the construction labor. T. 1053-54. Mr. Noble told Complainant he thought it was illegal to obtain government property and trade it for services. T. 1054. Nevertheless, without asking Mr. Noel or informing Mr. Noble, Complainant arranged for the loft to be built. Mr. Noel was on leave at the time. T. 1055. Mr. Noel came into Mr. Noble's office at eight the next morning, December 17, 1986. Mr. Noel was very angry, called the building of the loft a stupid thing to do, and explained why it would be dangerous for employees and that the expensive new computer equipment could be damaged. T. 1055.

After all these incidents, Mr. Noble was fed up, particularly because Complainant was spending work time in this way and had not turned out any work product other than the list of noise hazardous areas. T. 1056. After talking to Mr. Noel, Mr. Noble told Complainant he was revoking her authorization to obtain surplus property, effective immediately. *Id*. She was "no longer authorized to go there [the surplus property office] period." T. 1057.

At two in the afternoon the same day, Mr. Loyberg called Mr. Noble asking why Complainant was going to put a desk in his lobby.[19] T. 1057. Mr. Noble told his administrative officer, Mrs. Myers, to find out if Complainant was at the surplus property office and if so to tell her to come back to OHTD

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immediately. T. 1057-58. Mrs. Myers gave this message to Complainant who was at the surplus property office. Complainant then called Mr. Tatum, but Mr. Noble interrupted the call when Mr. Tatum's secretary received it and ordered Complainant not to take any more property and return to the office immediately. T. 1058. Complainant believed Mr. Noble's revocation of her authority to obtain property at the surplus property office only applied to selecting additional property, not to property ordered prior to December 17, 1986. T. 345.[20]

Complainant was on leave from December 20, 1986, to January 5 or 6, 1987. Mr. Noble discussed the incident of December 17, 1986, with complainant and her union representative on January 9, 1987, and issued an Official Reprimand to Complainant on February 20, 1987. The reprimand was for "disobeying (Mr. Noble's) direct orders and (going) to (the surplus property office) that same afternoon despite my clear orders." C-209.

Mr. Noble had begun questioning Complainant's performance on the noise control and related self-study projects on November 14, 1986. He told her on that day that she had not produced any work on her assignments and that he would evaluate her at that time as unsatisfactory. T. 974; R-69, p. 694; *see also* R-69, p. 695. By December 3, 1986, over a month after receiving the assignment, the only thing Complainant had produced was a list of noise hazardous areas, based on the hospital survey, which Mr. Noble considered a clerical function. T. 973, Mr. Noble expected to see a plan of the places Complainant was going to inspect and the first assessments. T. 973; R-69, p. 696. Mr. Noble gave Complainant specific directions on both the noise control and the industrial hygiene self-study project, with specific numerical targets for each assignment. T. 1010, 1016; R-69, pp. 699, 703. Mr. Noble explained that it is unusual for him to give this kind of detailed direction to an engineer. Ordinarily, he would let an engineer set his/her own work plans within the general parameters of the assignment. But in Complainant's case, he felt detailed direction was necessary because she had not produced any work other than the list of sites. T. 1011. On December 3, 1986, Mr. Noble again told Complainant that her work output was inadequate and that she was failing on all elements of her job description. T. 1039-41; R-69, pp. 705-706.

Mr. Noble compared the quality and quantity of complainant's work unfavorably to that of another engineer, Mr. Bass. Mr. Bass was an entry level GS-7 engineer to whom Mr. Noble gave another industrial hygiene assignment at about the same time he gave

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complainant the noise control assignment. T. 1022. Within a few weeks, Mr. Bass was taking on more assignments, of greater difficulty, than Complainant. *Id*. In addition, Mr. Noble had to spend much less time supervising Mr. Bass than Complainant, even though Complainant had the lowest workload in the office. T. 1023. Mr. Noble explained that, due to staff shortages and unusual demands on his time, dependability and ability to work independently with a minimum of supervision were very important. T. 972.

Complainant made a number of requests for training in her areas of responsibility. T. 354. Mr. Noble told Complainant that he planned to bring in a consultant to do noise control training which she as well as another engineer could take. T. 963. In the interim, Mr. Noble gave Complainant the industrial hygiene self-study materials, which had a number of sections on noise control. T. 963. He also directed her to reference materials available in the office, and told her to work with Mr. Loyberg to learn the basics of hearing conservation and noise control. *Id*. In December 1986 and January 1987, Mr. Noble worked with Complainant on her individual development plan. R-49. Mr. Noble developed similar plans with all his staff members. T. 1114. In January 1987, Mr. Noble also assigned Dr. Haberman; an industrial hygienist, to assist Complainant in working on the self-study material. T. 1061.

Mr. Noble expected Complainant to perform only the most rudimentary analysis of noise problems. T. 1066. It was the kind of analysis an experienced mechanic could perform and did not require formal training. T. 1066-67. Mr. Loyberg described Complainant's assignment as "low echelon . . . in terms of the engineering expertise required . . . . " T. 1865. Complainant's task was to find the "many things that can be done in noise control that are fairly simple and fairly straightforward to reduce the amount of noise." *Id*.

On a number of occasions in January and February 1987, complainant requested that she be allowed to obtain training and certification as a technician for taking sound level measurements. T. 1126; see C-3, p. 11, § 5.2.1(a). Mr. Noble explained to Complainant that this training was very broad in scope and only touched briefly on noise control. T. 1126-27. He told her she did not need this certification to carry out her noise control assignment. T. 1127-30.

During a review of Complainant's work on February 9, 1987, Mr. Noble asked Complainant why she had Recommended reducing noise by replacing a particular saw with a machine called a

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"broho saw." T. 1532. Since a broho saw can be used in only certain situations, Mr. Noble asked Complainant what kind of saw was then being used at the site. Complainant did not know, which led Mr. Noble to question whether she had really looked at the saw at all. Complainant's response was that this was another area in which she needed training. T. 1532-33. Mr. Noble told complainant this is not something that requires training - you simply look at the saw to see what type it is. This is "pretty elementary," especially for an engineer with eight years' experience at an industrial shipyard. T. 1656. Mr. Noble believed that it bordered on malpractice for Complainant to make a recommendation for reducing noise by substituting one kind of saw for another when she did not know what kind of saw was being used at the site. T. 1658.

Mr. Noble asked Complainant to show him the progress she had made on the noise control and self-study projects on January 16, 1987. T. 1089. Complainant could not show any work on noise control engineering assessments or that she had completed any of the noise control and hearing conservation sections in the self- study materials. T. 1091.[21] In addition, Mr. Noble believed that complainant tried to present a sound level meter calibration sheet prepared by Mr. Loyberg as her work product. T. 1090. Because of the lack of progress on her assignments, Mr. Noble therefore decided to issue a Notice of Unsatisfactory Performance and 30 Day Period to Correct Performance (30 day notice), which was given to Complainant on January 22, 1987. C-156.

The 30 day notice reviewed Complainant's lack of progress on the noise control and self-study assignments and rated her performance "unsatisfactory." *Id*. The 30 day notice emphasized that "[y]ou have done virtually nothing as far as going into the shops to initiate engineering assessments as directed." *Id*. The 30 day notice explained why Complainant's asserted lack of training was not an excuse for failure to make progress on her assignments. *See* pp. 39-40 *supra*. In addition, the 30 day notice pointed out Complainant's inappropriate behavior (apparently referring to the Balli and the "USE" incidents), and the failure of Complainant to follow the chain of command in sending the letter to the Mare Island Commander. C-156. Mr. Noble rated Complainant's performance overall unsatisfactory, saying she was "not performing at the level of an entry level (new graduate) engineer." *Id*. In comparison, Mr. Noble described at the hearing the work done by Mr. Bass, an entry

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level engineer, during the same time period. T. 1091. The 30 day notice warned Complainant that unless she made significant progress she would be fired. C-156, p. 648.

Four days after receiving the 30 day notice, on January 26, 1987, complainant was scheduled to have a meeting with Mr. Noble at 12:30 to review her progress on her assignments. R-69, p. 742; T. 1183. At about 8 A.M. Complainant requested that the time for the meeting be changed and Mr. Noble rescheduled it for 10 A.M. R-69, p. 742; T. 394; T. 1183-84. Mr. Noble saw Complainant outside his office at 9:45 A.M. Sometime before 10 A.M., Complainant left OHTD and went to an office in a building next door. R-69, p. 742; T. 394; T. 1185. Complainant returned to OHTD and was 15-20 minutes late for the meeting.[22] Mr. Noble met with Complainant at 10:30 but she had no work product to present. T. 1186.

Mr. Noble issued a Decision to Suspend Complainant for three days on January 29, 1987, because of the incident on January 26, 1987, for "unwillingness to follow directions . . . . " C-179. Mr. Noble considered Complainant's failure to attend the meeting on time "a conscious act of defiance [and] disregard[ ] [of Mr. Noble's] directions . . . ."[23] T. 1516. He also considered it a repetition of conduct for which she had been reprimanded on January 13, 1987 (the surplus property incident) and warned several

times. He also took into account the fact that complainant was under a 30 Day Notice to Improve Performance. C-188; T. 1516-17.

During this same time period, on January 7, 1987, another incident occurred which led Mr. Noble to warn Complainant about her conduct. At about 7:30 P.M., after Complainant's regular working hours, Mr. Hanson, the supervisor in the office on the swing shift, saw Complainant going through papers on a secretary's desk. Mr. Hanson asked Complainant what she was looking for and she said she was looking for her leave slip. Mr. Hanson told Complainant to ask the secretary the next day for anything she needed. As Complainant turned to leave the desk, she yelled "[a]--h---." Mr. Hanson told Complainant to stay out of his area during swing shift. Complainant went back to her cubicle and again yelled "[a]-- h---." R-69, P. 878-79; T. 1540- 41; T. 573-576. Complainant testified that she had the right to call Mr. Hanson an a-- h---. T. 576. Mr. Noble only warned complainant about this kind of conduct, but did not impose any discipline for it. R-73, p. 878.

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After giving Complainant the 30 day notice, Mr. Noble met with Complainant almost every week to review her progress on her assignments. At the first such meeting on January 26, 1987, Complainant had no work product to show Mr. Noble. T. 1525. At the meeting of February 2, 1987, Mr. Noble knew that Complainant had gone over some material in the self-study project with Dr. Haberman and had met with Mr. Loyberg and completed the training Mr. Noble had directed Mr. Loyberg to give her. T. 1525-26. Complainant gave Mr. Noble her field notes on noise hazardous areas she had inspected. However, the notes contained very little information, with much of it being just a restatement of the findings of the Naval Hospital report. T. 1527. Mr. Noble characterized it as having "no real engineering evaluation in it." T. 1527; R-69, pp. 748-49. Again on February 9, 1987, Mr. Noble found that Complainant had not done any engineering evaluation of noise problems. T. 1532; R-69, pp. 757-58. (This was the meeting in which Mr. Noble questioned Complainant's recommendation to substitute a broho saw for another saw. *See supra* at 40-41.)

On February 19, 1987, when Mr. Noble was on leave Ms. McLouth, another engineer, held the weekly assignment review meeting with Complainant. T. 1542. In a memo to Mr. Noble summarizing the meeting, Ms. McLouth first complained that Complainant misled her into believing Complainant was entitled to have a union representative sit in on the assignment review meeting. R-69, p. 760. Ms. McLouth then reported that Complainant submitted some reports on noise control which contained initial assessments and recommended solutions. But Ms. McLouth said "[Complainant's] reports were poorly organized and difficult to follow. Without looking at the problems myself, I had a hard time understanding the problems and solutions she recommended. There were a lot of unnecessary visit and Telephone Conversation Records which tended to take up filing spaces and confuse the matter." R-69, p. 762.

Mr. Noble held another assignment review meeting with Complainant on February 25, 1987. T. 1545, R-69, p. 763. Although Complainant submitted a large volume of paper to Mr. Noble at this meeting, most of it was records of telephone conversations. Out of 13 assessment sheets, only six contained actual assessments of noise problems, and these were separate assessments of the same make and model of tool at different locations. *Id*. Mr. Noble characterized Complainant's work product as "meaningless" generation of paper which did not represent much serious work, R-69, p. 763,[24]

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See, e.g., C-213, pp. 780-804.[25]

Mr. Noble held another work review meeting with Complainant on March 4, 1987. Complainant presented her phone records and field notes, but no engineering assessments. R-69, p. 764, pp. 809-828. Mr. Noble characterized Complainant's work output as "negligible" and the quality as "poor". R-69, p. 764.

Complainant was on leave from the middle of March 1987 to April 13, 1987. When she returned she was given a Notice of Unsatisfactory Performance, Decision to Transfer, and Withhold within-Grade Increase. R-66. Complainant was involuntarily transferred to the Planning Department. T. 402.

Complainant filed & complaint on February 20, 1987, alleging she had been discriminated against when she suffered "adverse personnel actions soon after submitting reports identifying violations of the (four acts), and by insuring that upper-level management was informed of such documents," D, and 0, at 2.

IV. Conclusions of Law.

The elements and order of presentation of proof of illegal retaliation in whistleblower cases have been set forth by the Secretary in a number of cases. *See, e.g., D'Agostino v. B & O Distribution Service, Inc.*, Case No. 88-STA-11, slip op. at 3-4 (Surface Transportation Assistance Act); *Sherrod v. AAA Tire & Wheel*, Case No. 85-CAA-3, Sec. Dec. November 23, 1987, slip op. at 2 (Clean Air Act); *Dean Dartey v. Zack Co. of Chicago*, Case No. 82-ERA-2, Sec. Dec. April 25, 1983, slip op. at 6-9 (Energy Reorganization Act) The courts of appeals have endorsed these elements. *Roadway Express v. Brock*, 830 F.2d 179, 181 n-6 (11th Cir. 1987); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *DeFord v. Secretary of Labor,* 700 F.2d 281, 286 (6th Cir. 1983).

In *Dartey v. Zack Company*, 82-ERA-2, issued April 25, 1983, the Secretary held that:

> [T)he employee must initially present a prima facie case consisting of a showing that he engaged in protected conduct, that the employer was aware of that conduct and that the employer took some adverse action against him. In addition, as part

of his prima facie case, "the plaintiff must present evidence sufficient to raise the inference that . . . protected activity was the likely reason for the adverse action." [citation omitted]. If the employee establishes a

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prima facie case, the employer has the burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. [Citation omitted).

If the employer successfully rebuts the employee's prima facie case, the employee till has "the opportunity to demonstrate that the employment decision .. .. [The employee] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." [Citation omitted]. The trier of fact may then conclude that the employer's proffered reason for its conduct is a pretext and rule that the employee has proved actionable retaliation for protected activity. Conversely, the trier of fact may conclude that the employer was not motivated, in whole or in part, by the employee's protected conduct and rule that the employee has failed to establish his case by a preponderance of the evidence. [Citation omitted]. Finally, the trier of fact may decide that the employer was motivated by both prohibited and legitimate reasons, i.e., that the employer had "dual motives."

. . . [I]f the trier of fact reaches the latter conclusion, that the employee has proven by a preponderance of the evidence that the protected conduct was a motivating factor in the employer's action, the employer, in order to avoid liability, has the burden of proof or persuasion to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. [Citations omitted].

Slip op. at 7-9

Respondent argues that Complainant has not proven the first element of a prima facie case, that she engaged in protected activity, because internal reports to management are not a protected activity under any of the statutes in this case. Navy's Initial Brief at 30. Although there have been no previous

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decisions by the Secretary addressing in detail the scope of protected activity under CERCLA, the Secretary has held that filing internal complaints is a protected activity under CERCLA. *See Willy v. The Coastal Corporation*, Case No. 85-CAA-1, Sec. Dec. and Order of Remand, June 4, 1987, slip op. at 3-7, and ALJ Recommended Dec. and Order, November 29, 1988, following remand by the Secretary, slip op. at 1, n. 1. (Safe Drinking Water Act, 42 U.S.C. § 300j-9(i), CERCLA, Clean Air Act, Clean Water Act, Solid Waste Disposal Act, Toxic Substances Control Act); *Poulos v. Ambassador Fuel Oil Co., Inc.*, Case No. 86-CAA-1, Sec. Dec., April 27, 1987, slip op. at 4-11 (Clean Air

Act). *See also Wells v. Kansas Gas and Electric Co.*, Case No. 83-ERA-12, Sec. Order, June 14, 1984, *aff'd sub nom, Kansas Gas & Electric v. Brock*, 780 F.2d 1505; 1513 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986), and *Mackowiak v. University Nuclear Systems, Inc.*, Case No. 82-ERA-8, Sec. Dec., April 29, 1983, slip op. at 8-11, *aff'd*, 735 F.2d 1159, 1163 (9th Cir. 1984) (Energy Reorganization Act). The employee protection provisions of some of the statutes listed in 29 C.F.R. Part 24, as they relate to internal complaints, are similar to, or even more narrow than, the employee protection provision of CERCLA. *Compare*, for example, the Clean Water Act, 33 U.S.C. § 1367 (a), and the Solid Waste Disposal Act, 42 U.S.C. § 6971 (a), *with* CERCLA, 42 U.S.C. § 9610 (a) As the Secretary said in considering the internal complaint in *Willy v. The Coastal Corporation*, "[i]t seems clear that Congress intended all of these laws to be interpreted in a parallel manner." Slip op. at 4.[26]

Moreover, CERCLA prohibits discrimination because a person "has provided information to a State or to the Federal Government . . . ." 42 U.S.C. § 9610(a). Here, Complainant provided information, through the Hazardous Waste Oversight Reports and the letter to the Commander, to the Respondent, an agency of the Federal Government. In addition, Complainant met with Mr. Refsell, a California hazardous waste inspector specialist, four times in February, 1986, to provide him the findings from her hazardous waste reports, T. 49-51,[27] I therefore find that Complainant's activities were protected under CERCLA.

Respondent also argues that Mackowiak is limited to protection of internal complaints by quality control inspectors, and that it is limited to the ERA because that statute requires licensees of the Nuclear Regulatory Commission to establish quality control programs. Navy's Initial Brief at 33. However,

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the Secretary has held, both under the ERA and other whistleblower laws, that personnel other than quality control inspectors can be protected for their internal complaints, *Nunn v. Duke Power Co.*, Case No. 84-ERA-27, Sec. Dec. July 30, 1987, slip op,. at 11 (a, welder); *Willy v. The Coastal Corp*. (an attorney); *Poulos v. Ambassador Fuel Oil Co.* (truck driver); *cf., Consolidated Edison Co. of N.Y. v. Donovan*, 673 F.2d 61 (2d Cir. 1982) (mechanic).

Complainant has therefore established a prima facie case of retaliation. She engaged in the protected activities of writing the hazardous waste oversight reports and the letter to the Mare Island Commander, all of which her supervisors knew about.[28] She was disciplined several times shortly after writing the letter, including (1) a reprimand, (2) a three day suspension, (3) a 30 day notice to improve performance, and (4) a notice of unsatisfactory performance, decision to transfer and withhold within-grade increase.

Respondent also clearly has carried its burden of articulating legitimate, non-discriminatory reasons for each of these actions: (1) Complainant's going to the surplus

property office after being given a clear order not to do so and having been warned several times about improper acquisition of unneeded government property; (2) deliberately missing a meeting after being told the time for the meeting three times shortly beforehand; (3) inadequate performance, insubordination, and improper conduct; and (4) continued inadequate and unsatisfactory performance.

The evidence in the record is all but overwhelming that Respondent had substantial, multiple reasons for disciplining complainant. Furthermore, with the exception of one protected activity - the December 3, 1986, letter to the Shipyard Commander - I find that with respect to all of Complainant's other protected activities, Complainant has not carried her burden of proving by a preponderance of the evidence that Respondent's reasons, or any one of them, were pretextual or that a discriminatory reason more likely motivated the adverse actions taken. In other words, Complainant has not proven a causal connection between any of her protected activities, other than the letter to the Shipyard Commander, and the adverse actions taken against her.[29]

There is direct evidence, however, in Mr. Noble's notes and his testimony, that the actions he took after December 3, 1986, were motivated at least in some part, by Complainant's protected

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activity of writing the letter to the Shipyard Commander, Nevertheless, as more fully explained below, I find that Complainant's work performance and intolerable behavior in many other respects fully justified the actions taken against her, and that Respondent has proven by a preponderance -- indeed by a substantial preponderance -- of the evidence that it would have taken the same actions if Complainant had never written the letter. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1789-90 (1989); *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983); *Mt. Healthy City School District v Doyle*, 429 U.S. 274, 287 (1977); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F..2d 1159, 1164 (9th Cir. 1984); *Dartey v. Zack Co. of Chicago*, slip op. at 9.

Complainant was an employee with a history of employment difficulties and barely adequate or marginal performance for several years before she began work in OHTD. In 1984, her supervisor noted on Complainant's performance appraisal that he expected improvement in one of Complainant's critical performance elements. *See* discussion *supra* at 17. A year later in March 1985, the same supervisor evaluated Complainant's performance as marginally satisfactory on one critical element, and as needing improvement on a noncritical element. *Supra* at 17-18. He also noted what he believed to be abuse of sick leave, *supra* at 18, and recommended that Complainant receive counseling from the employee assistance program. *Id*.

Complainant then began what appears to be a pattern of attempting to change jobs when her performance or behavior was questioned. Four days before receiving her critical 1985 performance appraisal, Complainant requested a transfer and a voluntary

reduction in grade. *Supra* at 18-19. In the face of her difficulties with Mr. Zebrowski, her explanation for this action is weak and not credible.[30]

Within a year of transferring to a new supervisor and, in effect, getting a fresh start, Complainant's performance was evaluated as "Marginal" by Mr. Stephens in March 1986. Complainant was rated "Marginal" on two critical elements out of three, and was given specific detailed instructions for each phase of her work to help her improve in a 60-day re-appraisal period. *Supra* at 20. Although Complainant improved in some respects during the 60 day period, Mr. Stephens still found her overall performance "Marginal". *Supra* at 21.

Complainant filed a grievance over Mr. Stephens' March 1986 performance appraisal, which was emphatically denied by the division manager on August 3, 1986. *Supra* at 21-22.

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complainant's within-grade increase was withheld in August 1986 because her work had not improved, and she was warned that she would be fired it she did not improve, In the summer of 1986, complainant filed another grievance claiming Mr. Stephens was harassing her with respect to leave. Mr. Stephens rejected this grievance on August 21, 1986. *Supra* at 22-23. Complainant also suggested that Mr. Stephens harassed her because she was a woman, T. 435, and that Mr. Stephens' editing of her reports was harassment. T. 451.

During the summer of 1986, as matters were going downhill for complainant under Mr. Stephens, supervision, Complainant approached Mr. Noble about transferring to OHTD. *Supra* at 25. Although he had misgivings because he was aware of her problems under her two immediate past supervisors, Mr. Noble gave Complainant another fresh start because she seemed enthusiastic about areas related to the work he had for her in OHTD. *Supra* at 25. Complainant's employment history at Mare Island, of which Mr. Noble was aware, corroborates Mr. Noble's testimony that he disciplined Complainant for unsatisfactory performance and disruptive and insubordinate behavior, which he viewed as a repetition of her past work pattern, rather than for reporting hazardous waste problems. *See* T. 907; 931; 1048; 1748.

Complainant asserts in this proceeding that one fact which tends to prove retaliatory motive is that Mr. Noble reassigned her in October 1986 from hazardous waste engineer to mechanical engineer as punishment for Complainant's hazardous waste reports. T. 442. Both Mr. Noble and Mr. Tatum testified they never intended to assign Complainant to be the hazardous waste engineer. They had already made a commitment to hire Mr. Tung in that position, and only intended to assign Complainant (as well as two other engineers with no hazardous waste training) temporarily to hazardous waste auditing because the Mare Island Commander wanted the program to become visible immediately without waiting for Mr. Tung to start work. *See* discussion *supra* at 25-26. This explanation of the

events surrounding Complainant's transfer to OHTD is corroborated by Complainant herself. In Complainant's Interview Statement taken by a Wage- Hour compliance Officer (and introduced by Complainant, C-218) complainant said "I think that I was transferred into [OHTD] with the understanding that I would do it (hazardous Waste oversight] for awhile; then I would assist (Mr.) Tung, and then I could replace (Mr.) Tung on an as needed basis." C-218, P. 833. Complainant also testified that she knew in August 1986, when she was notified about her transfer to OHTD, that she was not going

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to be the Hazardous Waste oversight Engineer. T. 438. *See also* testimony of Mr. Tung, T. 1208-9.

Shortly after transferring to OHTD, Complainant became dissatisfied because Mr. Noble was editing her hazardous waste reports. Complainant spoke to Mr. Tatum about it, and asked him for another assignment. Mr. Tatum viewed this as an attempt by Complainant to circumvent Mr. Noble's direction. T. 1379, 1483.

Complainant alleged that her hazardous waste reports were held up and edited by Mr. Noble because they were too controversial and hard hitting. C-218; R-48. Mr. Noble testified he held up some of the reports she drafted for editing because he found them wordy, ungrammatical, poorly organzied and containing too much opinion rather than simple reporting of facts. *Supra* at 27-28. (Mr. Noble found the first few reports by Complainant acceptable, and even wrote on one of them "[l]ooks good . . . lets really hit it this week, I want to get as many places looked at as possible . . . .") one need not be an expert in hazardous waste to recognize, for example, that the final version of Hazardous Waste Oversight Program Surveillance Report #20, C-30, pp. 197-202, is much more readable and effective than ComplainAnt's draft, C-100, pp. 492-494.

However, even if an argument may be made that Complainant's approach was preferable, as the supervisor responsible for the reports, Mr. Noble was well within his authority in requiring stylistic and organizational changes. Moreover, Complainant has not identified any substantive point made in her drafts which was deleted or softpedaled in the final reports. *See, e.g.*, Complainant's testimony at T. 516-530.

Complainant attempted to show that Mr. Noble wanted to tone down or softpedal the findings in her hazardous waste reports because Mr. Noble was concerned about the strong reaction by some of the shop supervisors to Complainant's findings. *See* e.g., T. 279; 281; 282; 297-299. The ALJ apparently reached the conclusion, based on the testimony of Mr. Lee, an environmental engineer in the Environmental Engineering Branch, that Mr. Noble and Mr. Tatum were influenced by the reaction of "shop superintendents" to Complainant's hazardous waste reports. D. and O. at 16. This conclusion is not supported by the record. Mr. Lee's testimony was based on hearsay and was merely speculation on his part. *See* T. 282. Mr. Lee testified that he had no knowledge of whether a shop supervisor, Mr. Bennett, told Mr. Noble, Mr. Tatum, or

anyone else about Mr. Bennett's belief that Complainant should be removed from working on hazardous waste oversight. T. 288. *See also* T. 299-300; 300-301; 301-303;

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304; 309-310; 314.

I find that there is nothing in the record to support an inference that Complainant's supervisors, Mr. Noble and Mr. Tatum, wanted to cover up or downplay hazardous waste violations. On the contrary, there is record evidence that Mr. Noble took his Job seriously and wanted to produce the most effective reports possible. Mr. Noble supported one of Complainant's first reports, as noted above, and urged her to pursue her oversight activity vigorously. C-81. He also had written one of the first hazardous waste oversight reports at Mare Island in 1984, which found 70 areas of noncompliance or partial compliance. *Supra* at 26. Mr. Tatum, who concurred in the adverse actions against Complainant, had initiated the first hazardous waste reports at Mare Island in 1983. T. 1354. Mr. Lee, who was responsible for hazardous waste management, T. 242-243, testified that the hazardous waste oversight reports prepared after Complainant was assigned to other work were just as hard hitting as the ones in which she participated. T. 314. *See Atchison v. Tompkins-Beckwith, Inc.*, Case No. 82-ERA-12, Sec. Dec. Jan. 28, 1988, slip op. at 21, *aff'd, Atchison v McLaughlin*, No. 88-4150 (5th Cir. Nov. 7, 1988).

The record also supports Respondent's contention that Complainant's performance on her major assignments was inadequate. When Mr. Noble gave Complainant the noise control assignment, she said she thought it was trivial, even though Mr. Noble explained the importance of it to Mare Island in potential workers' compensation claims. *Supra* at 31. Between October 28, 1986, the date the noise assignment was given to complainant, and January 16, 1987, the only work Complainant had produced on the assignment was a list of noise hazardous areas extracted from the Naval Hospital report. She also had met with Mr. Loyberg a number of times and accompanied him in the field, for on-the-job training in noise level measurement. T. 1871. She had not done any engineering assessments, T. 1089, which was the object, the end product, of the assignment.[31] Complainant also had failed to develop a list of priority sites to be evaluated, with target dates for performing the evaluations.

From January 1987 to March 4, 1987, Complainant submitted a substantial amount of paper to Mr. Noble at weekly assignment review meetings. Most of it, however, was field notes, and records of visits and telephone conversations. Complainant still. did not produce any engineering evaluations. *Supra* at 44-45. It is important to note that the level of engineering evaluation

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Mr. Noble was looking for was quite basic and unsophisticated. *Supra* at 40; T. 1063-67. Mr. Noble contrasted Complainant's work during this period with that of Mr. Bass, a newly hired entry level GS-7 engineer. Mr. Bass had many more assignments than complainant and produced a much greater amount of work. *Supra* at 39; T. 1091-92.

I therefore conclude that Respondent had substantial, legitimate reasons for the unsatisfactory performance appraisal, decision to transfer, and decision to withhold Complainant's within-grade increase. Complainant has not carried her burden of proving by a preponderance of the evidence that these reasons were pretextual or that a discriminatory reason more likely motivated Respondent,

In addition, Respondent had ample grounds based on Complainant's conduct and behavior alone to discipline, perhaps even to discharge, her. The record demonstrates that her behavior on a number of occasions from September, 1986, to March, 1987, was unprofessional, irresponsible, disruptive, insubordinate, and sometimes bordered on the outrageous. *See, e.g.*, the "Balli meeting," *supra* at 28-29; the "USE meeting," *supra* at 29-30; Complainant's behavior toward Mr. Noble after being removed from the hazardous waste meeting on November 14, 1986, *supra* at 32; the "Hewlett-Packard computer" incident, *supra* at 34-35; the "loft construction" incident, *supra* at 36; the "surplus property and desk in Mr. Loyberg's office" incident of December 17, 1986, *supra* at 37; the name calling incident with Mr. Hanson of January 7, 1987, *supra* at 43-44; the "broho saw" incident, *supra* at 40-41.[32] In *Dunham v. Brock*, 794 F.2d 1037, 1041; (5th Cir. 1986); for example, the court held that "abusive or profane language coupled with defiant conduct or demeanor justify an employee's discharge on the ground of insubordination." *See also, Howe v. Domino's Pizza Distribution Corp.*, Case No. 89-STA-11, Sec. Dec., January 25, 1990.

As in many cases of this kind, there are at least two versions of events, the Complainant's and that of the immediate supervisor. The ALJ found Mr. Noble's testimony "inherent[ly] incredible[]," D. and O. at 40, and refused to credit major portions of his testimony. I am, of course, not bound by the credibility determinations of the ALJ, although they are entitled to the weight which "in reason and in the light of judicial experience they deserve." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496 (1951). The ALJ's findings must be considered

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in light of "the consistency and inherent probability of testimony," *Id. See also, Ertel v. Giroux Brothers Transportation, Inc.*, Case No. 88-STA-24, Sec. Dec. Feb. 16, 1989, slip op. at 12 nn. 7-8; *Perez v. Guthmiller Trucking Co.*, Case No. 87-STA-00013, Sec. Dec. Dec. 7, 1988, slip op. at 13-14.

On the crucial events in this unfortunate matter, I find that Mr. Noble's testimony is corroborated by that of other more disinterested, witnesses (and sometimes even by the Complainant herself), and it is logical and consistent with the flow of events.

Complainant's testimony, on the other hand, is sometimes internally inconsistent or is contradicted by other testimony and exhibits. To the extent that there are direct conflicts between the testimony of Complainant and that of Mr. Noble, I credit: Mr. Noble's testimony, and I also reject the ALJ's finding as to Noble's credibility.

Complainant asserted, for example, that she was hired as the hazardous waste oversight engineer and Mr. Noble reassigned her from hazardous waste oversight to the noise control project in retaliation for her reports which were too "hard hitting" and "contraversial [sic]". R-48. Mr. Noble testified that he reassigned her because the permanent engineer had come on board and Mr. Noble never had intended to appoint Complainant as the permanent hazardous waste oversight engineer. Mr. Tatum and Mr. Tung, the permanent engineer, both confirmed Mr. Noble's testimony on this point. *Supra* at 25-26. Complainant made inconsistent statements about this point in her testimony. *Compare* T. 141 and 145 *with* T. 438. But in her Wage-Hour interview statement, taken on March 10, 1987, Complainant said "I think I was transferred into [OHTD] with the understanding that *I would do it for awhile*; then I would assist [Mr.] Tung, and then I could replace Tung on an as needed basis." C-218 (emphasis added). In addition, as discussed above, the record shows that Mr. Noble was not afraid of issuing hard hitting, controversial reports.

Mr. Noble testified he was told by Dr. Cornils that Complainant's behavior in the "USE" meeting in the middle of October 1986 had been argumentative and counter productive. This is corroborated by a note written by Dr. Cornils in January 1987 stating that he had not hired Complainant for an environmental engineer position because of "her uncontrolled actions at a past meeting concerning USE . . . ." R-56.

Mr. Noble explained the nature of Complainant's noise control assignment as being only a rudimentary analysis of noise problems which any mechanic could perform and which did not

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require formal training. Mr. Loyberg, the audiologist, confirmed this, describing the engineering involved in Complainant's assignment as "low echelon", consisting of finding the "fairly simple and fairly straightforward [steps] to reduce the amount of noise." *Supra* at 40.

Complainant asserted she was repeatedly denied the training she needed to perform her noise control assignment. But complainant conceded on cross-examination, as Mr. Noble had testified, that she had not been denied formal training in noise control, the course just had not been scheduled yet. T. 595-596; R-49, P. 469. Complainant did receive substantial informal training through the industrial hygiene self-study material, office reference materials, and on-the-job training by Mr. Loyberg and study guidance by Dr. Haberman. *Supra* at 39-40.

Moreover, Complainant did not always focus her attention on training in noise control. For example, just before the 30 day notice was issued, Dr. Haberman wrote a memo to Mr. Noble stating that he had reviewed with Complainant material in the self-study package on liquid and solid waste. R-69, p. 736. This had nothing to do with Complainant's noise control assignment. Complainant also spent a considerable amount of time on what can only be described as frolics of her own, *e.g.*, the Hewlett- Packard computer incident and the loft construction incident, rather than studying noise control.

Other employees' descriptions of the principals in this case, Complainant and Mr. Noble, are persuasive in evaluating their credibility. Mr. Tatum had been Mr. Noble's supervisor since 1979. When Mr. Noble first started working for Mr. Tatum, if there was a problem with an employee's performance or attendance, Mr. Noble sometimes used an abrasive manner in dealing with the employee. T. 1381. Generally, however, Mr. Noble was correct in his assessment of the employee's performance. Mr. Tatum thought Mr. Noble had improved significantly over the years in communicating effectively with his employees. *Id*. Overall, Mr. Tatum described Mr. Noble as a "textbook manager." T. 1437. Mr. Loyberg, who had worked for Mr. Noble for a number of years, described him as "direct, fair, honest and straightforward." T. 1886.

The descriptions of Complainant by her co-workers seriously undermine her credibility. Mr. Tung described an incident in which Complainant asked Mr. Tung to sign his name to a hazardous waste report she had written and submit it to Mr. Noble. complainant thought this would show that Mr. Noble picked apart her reports only because she wrote them, not because of the

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quality of the work. T. 1213-14. Mr. Tung refused to do this because he thought it was unprofessional. T. 1214.

Mr. Loyberg testified that on one occasion when he and Complainant were to go into the field, he pointed out that she was not wearing any safety equipment - safety glasses, hearing protection, and safety shoes. T. 1883. When she got the equipment, she boasted to Mr. Loyberg that her safety shoes did not look like safety shoes. Complainant said she enjoyed having people question her about the shoes and being able to say they were in fact safety shoes. T. 1884. Mr. Loyberg thought this would set a bad example and was an immature attitude. T. 1884- 85.

On another occasion, Complainant told Mr. Loyberg she would include an assessment of a site that was not noise hazardous in one of her reports just "to show she had been doing things." T. 1878. Other employees also complained to Mr. Noble about being misled and taken advantage of by Complainant. *See* discussions *supra* at 35 and 45. Mr. Loyberg gave his opinion of Complainant that she was "manipulative," "combative" and expended a great deal of effort in getting out of her assigned task. T. 1885. Mr. Loyberg

compared Complainant to his "ten-year-old daughter [who] sometimes exhibits some of these same characteristics." T. 1886.

One of the crucial events in this case was Complainant's letter to the Mare Island Commander. R-48. Complainant asserts that this letter, which charged a cover-up of hazardous waste problems at Mare Island, was the key protected activity that motivated Mr. Noble's actions against Complainant. Mr. Noble testified that he thought Complainant's letter was the report of her hazardous waste concerns which she had mentioned to him on November 14, 1986, and which he had directed her to reduce to writing and send through Mr. Tung, himself, and Mr. Tatum. The ALJ simply did not believe that Mr. Noble thought the letter and the report were one and the same. The ALJ also did not believe that Mr. Noble was disciplining complainant not for the content of the letter but for insubordination in not sending it "through channels." As noted Above, however, to the extent that this letter to some extent motivated Respondent's actions against Complainant, I find that Respondent has carried its burden of proving it would have taken the same actions even if complainant had not written the letter. *See* discussions above at 51-67.

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V. Conclusion.

Having found that Complainant has failed to establish that Respondent violated the CERCLA, I do not consider the other issues, including the applicability of other statutes, remedies, or attorneys fees, raised by the parties and the ALJ's recommendations, since consideration of them is not necessary to this disposition.

Accordingly, the complaint in this case IS DISMISSED.

SO ORDERED.

ELIZABETH DOLE
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] Although this complaint was given an "ERA" case number by the Office of Administrative Law Judges, it does not involve allegations or claims under the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1982).

[2] Section 9601 states:

> For purposes of this subchapter, the term--

* * * *

(21) *"person" means* an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, *United States Government*, State, municipality, commission, political subdivision of a State, or any interstate body;

(Emphasis supplied).

[3] Rule 12(b) provides that "[e]very defense in law or fact . . . shall be asserted in the responsive pleading" or by motion made before pleading.

[4] As the ALJ noted, the Navy, in its June 15, 1988, Pre-Trial Statement, stated its view that the Federal government as an employer was not subject to the environmental whistleblower provision, but the Navy neither expanded on this statement nor briefed it before the ALJ. D. and O. at 50.

[5] As discussed in detail at pp. 16 - 47 *infra*, the conduct of complainant and the actions of the Navy giving rise to this case occurred between September, 1986, and April, 1987, thus extending well beyond October 17, 1986.

[6] That the Federal facilities provision of CERCLA does not specifically mention the whistleblower provision does not alter by conclusion. *Cf. State of Maine v. Department of Navy*, 702 F. Supp. 322, 327 (D. Me. 1988).

[7] I also reject the Navy's argument that I lack authority to issue an order to another Federal agency because only the President has such power. Where I find that a violation has occurred, CERCLA directs me to require that the violator take action to abate the violation, and to provide appropriate relief authorized by the statute, 42 U.S.C. § 9610(b). I have no discretion to ignore this statutory directive. *Cf. U.S. v. Nixon*, 418 U.S. 683 (1979).

Furthermore, that Congress may not have provided specifically for funds in the Department of Navy's budget for relief for environmental whistleblowers retaliated against by the Navy is not a basis for concluding that Federal employees are not covered by CERCLA. "It has long been established that the mere failure of congress to appropriate funds, without further words: modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." *New York Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966).

[8] Section 2302(b) (8) provides:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

* * * *

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for--

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, Or a substantial and specific danger to public health or safety;

[9] This Joint Explanatory Statement, which explains the new provisions of an earlier bill (S. 508), was adopted by Congress as part of the legislative history of S. 20 which was enacted as the WPA of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) *See* 135 Cong. Rec. § 2781 (daily ed. March 16, 1989) (statement of Senator Levin):

> [T]his, legislative history is controlling as to the intent of Congress in the interpretation of S. 20.
> Of particular importance is the joint explanatory statement issued upon final passage of S. 508 in the last Congress. This joint explanatory statement expresses the mutual understanding [of] the Senate and House floor managers of the bill as to the intent of its provisions.

[10] The alleged retaliation against Complainant Pogue occurred before the effective date of the 1989 WPA amendments. See infra at pp. 16 - 47.

[11] A critical element is defined in an instruction from the Commander of Mare Island as "[a]ny requirement of the job which is sufficiently important that inadequate performance of it outweighs acceptable or better performance in other aspects of the job." C-13, p. 60. The instruction states "[i]t is the policy of this Shipyard that when an employee is found to be performing unacceptably in one or more critical elements . . . action to remove the employee or change him/her to lower grade will be taken . . . ." *Id*. at p. 58. *See also* 5 C.F.R. § 430.203 (1989).

[12] The remainder of this note is not legible.

[13] The note continues "[e]mployee's comments are attached," but these comments are not in the record.

[14] All the Departments at Mare Island are referred to by their code numbers. Nuclear Engineering is Code 2300. Code 380 is the Production Engineering Division.

[15] Some of these documents actually tend to show that complainant's supervisors had questions about her performance. *See, e.g.*, C-19, Progress Review of July, 1984, by Mr. Zebrowski, noting three "areas of concern" but giving Complainant more time to gain experience in those areas and "an opportunity to show competence." There is no explanation in the record for the hand written statement on C-37 by Mr. Rosauro that he was Complainant's first line supervisor from "2/85-8/85." As discussed above, Mr. Zebrowski signed Complainant's official performance appraisal covering the period October 9, 1984, to March 29, 1985. Complainant requested a downgrade and transfer out of Mr. Zebrowski's office on March 25, 1965, but it is not clear when that was effected. After she transferred to the Production Engineering Division, she was supervised by Mr. Stephens.

[16] Mr. Kelly was the reviewer of Mr. Stephens' March 31, 1986, performance appraisal of Complainant. *See* R-63, pp. 600, 607.

[17]At the hearing, Complainant's counsel objected to the admission of this testimony as hearsay to the extent it was offered to prove the truth of the facts asserted in the statements testified to. T. 840. It was not hearsay, however to the extent it was offered to show the nature and extent of Mr. Noble's knowledge of Complainant's employment history. I would also note that testimony is not inadmissible in these administrative hearings for that reason alone. *See* 29 C.F.R. § 24.5(e); 29 C.F.R. § 18.44(b) (1989).

[18] Mare Island has a formal program under which employees may submit what are called "Beneficial Suggestions." If a suggestion is adopted, the employee is eligible for a cash award. *See* C-47.

[19] Complainant apparently planned to work from a desk in the lobby of Mr. Loyberg's office, which is in a different location from Mr. Noble's office. T. 1879; 1058-59. There is nothing in the record to show that she ever discussed this with Mr. Noble or obtained his permission.

[20] In addition to the HP computer, the loft, and the desk, Complainant was involved in obtaining a filing cabinet and bookcases for other employees, T. 342, and a lamp for the lobby of Mr. Loyberg's office. T. 343.

[21] The only work on the self study assignment submitted by complainant had to do with hazardous waste control, which had nothing to do with noise control. T. 1093; R-69, p. 736.

[22] Based on R-69, p. 742 and Mr. Noble's testimony, at T. 1165, it would appear Complainant was out of OHTD for about 35 minutes, from 9:45 to 10:20. Based on Complainant's testimony, at T. 394, Complainant was out of OHTD for about 15 minutes, from just before 10 A.M. to 10:15.

[23] On January 30, 1987, Mr. Noble had to reissue this memorandum as a Proposal to Suspend because he lacked authority to effect a suspension, only to propose it.

Complainant had the right to have Mr. Tatum review the proposed suspension, and Mr. Tatum had the authority to make the final decision. T. 1516; T. 396; C- 183. I would note that the original Decision to Suspend, C-179, states "I am . . . recommending your suspension . . . . "

[24] Mr. Loyberg testified that Complainant once showed him a report she had done on a piece of equipment that was not noise hazardous. Mr. Loyberg told Complainant not to include that assessment in her report because it had nothing to do with her assignment. Complainant told Mr. Loyberg she wanted to include it in the report "to show she had been doing things." T. 187 .

[25] Complainant introduced what she described as a computer printout of noise control assessments she had done. C-255. She conceded, however, that she never gave this printout to Mr. Noble; this printout was not even generated until after Complainant had been transferred out of OHTD. T. 2061-62. Mr. Noble testified he never saw the other printouts introduced by complainant. C-252, 253, 254, 256.

[26] *See* the extensive cross references in CERCLA to the other environmental statutes, *e.g.*: 42 U.S.C. § 9601 (10), (14), (22), and (24).

[27] Although it is not clear from the record whether Respondent was aware of these contacts, Complainant's internal hazardous waste reports and the letter to the Shipyard Commander are sufficient protected activity to establish coverage.

[28]Complainant's hazardous waste reports and her letter to the Mare Island Commander raised potential violations of CERCLA. For example, Hazardous Waste oversight Program Surveillance Report #18 of September 26, 1986, (C-85) found "numerous problems" with the PCB waste storage building. C-85 at p. 440. PCBs are listed as Hazardous Substances under CERCLA by the Environmental Protection Agency. *See*, 40 C.F.R. § 302.4 (1989), Table 302.4, at page 135.

[29] I have considered Complainant's hazardous waste reports in their entirety, in evaluating the evidence to determine if Complainant has carried her burden of proof.

[30] Complainant testified that she wanted to transfer to get into "more nuclear type work." T. 606. But she was transferring out of the Nuclear Engineering Division, where her job title was nuclear engineer (which was her background and experience), to the Production Engineering Division, where her job title was Mechanical Engineer.

[31] Complainant argues that the time estimated by Mr. Noble for producing the list of noise hazardous areas, 8-10 hours, would have meant Complainant would have had 90 seconds to read and assess each site described in the Naval Hospital report. Complainant's Response Brief on Review at 106. But the original assignment gave complainant from October 28, 1986, to November 7, 1986, to develop the initial list. R-69, p. 696. Using Complainant's arithmetic approach, she would have had over 8 minutes to read each site report and assess whether it was a noise hazard. But, more importantly,

Mr. Noble did not base his appraisal on Complainant's failure to meet the original due date for the list. It was based on her failure to produce any significant work, other than the list, from October 28, 1986, to January 16, 1987.

[32] The ALJ found that an exhibit summarizing the disciplinary actions taken against shipyard employees since 1982, R-64, demonstrated disparate treatment of Complainant for two reasons. First, there are no professional employees on the list, which the ALJ found incredible. D. and O. at 44. Second, there is no evidence that the same employee was disciplined twice within three weeks. *Id*. (Apparently, the ALJ was referring to the 3-day suspension, issued on January 29, 1987, for conduct on January 26, 1987, and the reprimand, formally issued on February 20, 1987, for conduct which took place on December 1987.)

Neither the ALJ nor Complainant has explained why the disciplinary records of nonprofessional employees should not be compared to the treatment of a professional employee. presumably they would not suggest that professional employees should be held to some different, lower standard of behavior and conduct. Moreover, if Complainant relies on disparate treatment, it was Complainant's burden to show that there were other, professional or nonprofessional, employees who were not engaged in whistleblowing but who engaged in similar disruptive and insubordinate conduct repeatedly in a short period of time, who were not disciplined for it as was Complainant.

To the contrary, R-64 shows that many employees have received significant discipline, such as a reprimand or suspension, for a first offense, while Complainant received a number of warnings (not included in her personnel file) before being reprimanded and suspended. Some employees have been removed for one act or a few acts which do not equal Complainant's combined inadequate performance and irresponsible conduct.